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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PAUL HAGGIS, INC., et al., Plaintiffs and Respondents, v. PERSIK PRODUCTIONS, INC., et al., Defendants and Appellants.	B240556 (Los Angeles County Super. Ct. No. BC381582)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daniel J. Buckley, Judge. Affirmed.

Nahai Law Group, Behzad Nahai, and Edward Wei for Defendants and Appellants.

Ropers, Majeski, Kohn & Bentley, Terry Anastassiou; Arent Fox and Richard L. Charnley for Plaintiffs and Respondents.

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This is an action by writer-director Paul Haggis and others involved in the Oscar-winning film Crash for compensation they claim is due them under their contract with the film's principal backer, Persik Productions, Inc. In a bench trial the court found for the plaintiffs and awarded them over $12,000,000 in damages and prejudgment interest. We conclude that appellants have not carried their burden of showing prejudicial error, and we therefore affirm.

FACTS AND PROCEEDINGS BELOW

In summarizing the facts we view the evidence in the light most favorable to the judgment. (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 693-694.)

The plaintiffs in this action are Paul Haggis, who directed and co-wrote Crash, Bobby Moresco who co-wrote and co-produced the film, Mark Harris, a co-producer, and Brendan Fraser, an actor in the film. We refer to the plaintiffs collectively as Haggis.

The defendants are Persik Productions, Inc which provided the financing for the film and Persik's various subsidiaries which managed the finances and distribution of the film. We refer to the defendants collectively as Persik.[1]

A. The Parties' Agreement

In 2002, Haggis contracted with Persik to provide writing, directing and acting services for the film in return for a flat fee and contingent compensation (referred to in the contract as "third party participations") based on the film's gross revenue after deducting certain expenses. The budget for the film was between $7 and $8 million and it was made within budget. The disputes in this case arose when the revenue from the film reached the "third breakeven" point (a term defined in the contract).

The contract states in relevant part that, when the "gross receipts received by Persik" reach the "[t]hird [b]reakeven" point, Haggis and Persik would share the adjusted gross receipts 50/50. The term "gross receipts" is defined in the contract as "all sums

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1 The court subsequently granted Haggis's motion to amend the judgment to add Davand Holdings LLC and Bob Yari as additional judgment debtors. We separately consider their appeal from the court's ruling. (*Paul Haggis, Inc., et al. v. Yari et al.* (Jan. 31, 2014, B243369) [nonpub. opn.].)

actually received by . . . or credited to, or on behalf of, Persik, its subsidiaries and affiliated entities[.]" Under the contract Persik could deduct some of the film's domestic sales and distribution fees from gross revenue before distribution to Haggis but at the third breakeven point this deduction was capped at 32.5 percent. Finally, the contract stated that it "shall be subject to such other terms and conditions as are customary in the entertainment industry[.]" These terms were provided in a "short form" contract and no long form contract was ever executed.

After Haggis and Persik entered into their contract, Persik, sold its rights in the film to ApolloProScreen (Apollo) which then licensed some of the rights back to Persik.[2] Under an agreement between Persik and Apollo, Persik, through its subsidiary, Crash Distribution, LLC, set up two collection and management accounts (CAMs) with an independent company, Fintage, to receive, pay out and account for revenue generated by the film.

For each accounting period, the expenses incurred in the production and distribution of the film, including third party participations, were paid from the CAMs. Apollo and Persik then split the remaining amounts in equal shares.

Crash was released in the Spring of 2005 and was a commercial and critical success winning three Academy Awards including the Oscar for Best Picture.

Following the film's release Persik prepared quarterly statements and sent them to Apollo for approval after which the company handling the CAM accounts distributed money to Haggis based on instructions from Persik. In ordering those distributions Persik did not treat Apollo as a "third party participant" nor did it claim that it never received the "gross receipts" from the film.

In September 2006, Haggis hired a certified public accountant, Steven Sills, to conduct an audit of Persik's accounting for *Crash*. Sills reported to Haggis and Persik a

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[2] Persik also obtained funds from DEJ Productions and Lions Gate Films, Inc., neither of which are parties to this action.

number of errors in the accounting that had reduced the contingent compensation Persik owed to Haggis.

After Sills's audit showed that Persik owed Haggis more than $1 million, Persik's chief financial officer, Dennis Brown, claimed that he had discovered a "mistake" that had been made from the start in the method of calculating "third party participations" and that Haggis had actually been overpaid, not underpaid. According to Brown, the mistake was in failing to include Apollo and DEJ, the film's major financiers, among the "third party participants" entitled to a share of the film's gross receipts which reduced the profits available for distribution to Haggis.

Sills's 2006 audit also found that at some earlier point in time Persik had bought out the distribution rights of one company (DEJ Productions) and sold them to another distributor, Lions Gate. The buyout cost half-a-million dollars which Persik deducted from gross revenue before allocating profits to Haggis. In Sills's opinion this deduction violated the 32.5 percent cap on deductible distribution expenses under the contract. (See explanation of the contract at pp. 2-3, *ante*.)

B. The Lawsuit

1. Phase 1

In 2007, Haggis filed a complaint against Persik for breach of contract, declaration of constructive trust and an accounting. The parties stipulated to a bifurcated trial in which the court first conducted a bench trial on the declaratory relief cause of action. The issues to be tried in this "Phase 1" were: "(a) whether payments to Apollo Proscreen and DEJ Productions, Inc. are properly deductible as 'third party participations,' 'payments to third-party participants,' or 'distribution expenses,' and (b) whether payments to Syndicate Films International . . . are deductible as foreign sales agency fees." The parties further stipulated to the appointment of a referee to try Phase 1 of the case.

After hearing testimony from the parties and from experts on motion picture contracts and financing, and after reviewing the documents offered in evidence, the referee found in Haggis's favor on both issues. Persik does not challenge those findings on appeal.

As to the first issue the referee found that the terms "'third party participants' and 'third party contingent participants' are 'words of art' which are customarily used in motion picture agreements . . . and . . . were understood by all those who negotiated and drafted the agreement and were well known to them. . . . The overwhelming credible testimony is that a financier of the motion picture was not meant to be included in the term 'third party participants' and 'third party contingent participants.'" The trial court adopted the referee's finding.

On the second issue the referee found that Persik contracted with Arclight to handle international distribution of the firm and then paid Arclight $400,000 to terminate that contract so that it could use one of its affiliated companies, Syndicate Films International, to distribute Crash. He further found: "Syndicate was not entitled to charge any foreign sales fees for the territories previously sold by Arclight. It, however, did so. This would in effect be doubling up the fees charged. Arclight had already charged its sales fee. Syndicate likewise charged its full sales fee for servicing the territories which had already been sold by Arclight." Moreover, the referee found that "[e]ven a 5% . . . charge by Syndicate to [Haggis] on the sales made to foreign distributors by Arclight would be improper because the cap on distribution fees of 32.5% had already been reached." (See explanation of the contract at pp. 2-3, *ante*.) The trial court also court adopted this finding.

The court also declared the following findings by the referee to be of "special significance" for its decisions in Phase 2 of the trial—the claims for breach of contract and an accounting.

The referee found that the agreements between the parties "are typical motion picture agreements containing unique terms typically used in the entertainment [industry] . . . and were negotiated by very experienced attorneys[.]" Therefore, the agreements are "to be interpreted in accordance with industry standards as understood by persons in the motion picture industry[.]"

In addition, the referee found "[t]he testimony of the lawyers who actually drafted [the agreements] . . . to be more credible than that of [the defendants]" in interpreting the agreements. Accordingly, the court stated that it "gave little, if any, weight to the testimony of these defense witnesses."

Finally, the referee found that it was not until Sills's audit showed Persik owed Haggis "a significant amount of money" that Persik "'discovered' . . . that a 'mistake' had been made in prior statements" and that the payments Persik made to Apollo "could be charged as 'third party contingent compensation' and thus reduce the profit shares of [Haggis]." To the referee's report, the court added parenthetically: "This Court questions whether this was truly a mistake. The initial—and contractual—intent of the defendants was revealed by their actions, not by the words of counsel's arguments at trial."

2. *Phase 2*

In Phase 2 of the trial Persik contended that the interpretation of the contract it advocated in Phase 1—that payments to Apollo should be charged as third party compensation—was *also* a mistake and that the money Fintage paid to Apollo should never have been included in the film's "gross receipts" because it was never "received by Persik." (See summary of the contract at p. 2, *ante*.)

The attorneys who represented Haggis and Persik in negotiating the agreement rejected this interpretation of the contract between their clients as did the person who negotiated Apollo's financing agreement with Persik and as did Sills, the auditor. Sills testified that in reviewing the statements Persik generated before his audit he found that Persik reported all of the revenue from the film as gross receipts.

Only Brown, Persik's chief financial officer, testified in support of Persik's new interpretation of the agreement. The court found Brown's testimony "to lack credibility" because Brown was a Persik "insider" who "has been in the employ of [Persik] for years" and did not have “sufficient industry experience or background to provide reliable expert opinion testimony on whether amounts taken by Apollo were properly included or excluded from the [p]icture’s ‘gross’ [receipts].”

The court concluded “the evidence clearly established that all of the defendant entities are under the same ultimate ownership and control” of Bob Yari and Davand Holdings LLC who “at all times acted as puppet masters with respect to the control and management of the instant litigation.” The court further concluded that the defendant entities “are jointly and severally liable to plaintiffs for damages [for] their breach of the plaintiffs’ contracts.”

Based on the findings described above, the court ruled that Persik “breached the contracts with the plaintiffs by diverting funds to third parties; adopting bogus contractual interpretations; refusing to correct accounting errors in a timely fashion; adopting inappropriate accounting procedures that were contrary to industry standards; and, in the final analysis, using all of these to avoid paying plaintiffs money due under the contracts.” Finally, the court declared “that defendants hold money and assets acquired as a constructive trustee and an award of all damages and disgorgement of any profits that defendants have enjoyed as a constructive trustee in possession of plaintiffs’ property.”

The court awarded Haggis $9,113,960 in damages plus $2,551,310 in prejudgment interest.

Persik filed a timely appeal.

DISCUSSION

I. FOR PURPOSES OF CALCULATING THE SUMS DUE TO HAGGIS, “GROSS RECEIPTS” INCLUDE ALL THE REVENUE GENERATED BY THE FILM.

Paragraph 13(b) of the contract between Haggis and Persik provides that Haggis will share in a percentage of the gross receipts “actually received by . . . or credited to, or on behalf of Persik, its subsidiaries and affiliated entities, resulting from the distribution or other exploitation of the [film] and all rights therein” after deductions for certain expenses pursuant to a formula set out in the contract. Persik maintains that this provision means that Haggis is not entitled to a percentage of *all* gross receipts from the film but only a percentage of gross receipts "actually received" by Persik. Therefore, Persik argues, revenue distributed directly to Apollo through the CAMs does not count as gross receipts "actually received" by Persik and cannot be used in calculating Haggis's third party participation. The trial court disagreed and ruled that under the Haggis-Persik contract "money taken by Apollo could not be 'deducted' when calculating profit participations [for Haggis]." The trial court was correct.

The role of the court in interpreting a contract was summarized in *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107. We quote portions of that summary here. "The interpretation of a contract is a judicial function. In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. [¶] The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. [¶] When the meaning of the words used in a contract is disputed, the trial court engages in a three-step process. First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law." (*Id*. at pp. 1125-1126, citations omitted.)

The contract between Haggis and Persik shows that, at the time it was executed, the parties intended that Haggis's participation payments would be based on all gross receipts of the film. We reach this conclusion because there can be no doubt that this would be the result if Apollo had never appeared on the scene. At the time Haggis and Persik entered into their contract Persik was the sole financier and its subsidiaries and affiliated entities controlled the receipt of all the revenue from the film.[3] Accordingly, there was no one other than Persik who could have "actually received" the gross revenues from the film. Persik acknowledges that its contract with Haggis "was signed months before there were ever even discussions, much less an agreement, with Apollo." (Emphasis omitted.) Persik did not enter a financing deal with Apollo until a year later. As explained by Neil Sacker, the attorney who negotiated the contract with Haggis on Persik's behalf: "Persik was going to be the financier and so it was supposed to capture all of the . . . receipts that we received, as it says, from distribution or any other exploitation[.] So basically . . . all of the receipts from the exploitation of the film went into the pot . . . were gross receipts." Persik could not alter what it promised Haggis under their contract by entering into a subsequent contract with Apollo.

Although the contract between Persik and Apollo provided that they would share the gross receipts of the film their contract stated: "All participations and deferments shall be calculated by *aggregating* Apollo [g]ross [r]eceipts and [Persik] [g]ross [r]eceipts." (Emphasis added.) Thus, whether money from the film was "actually received" by Persik or by Apollo it counted as gross receipts for purposes of calculating Haggis's profit participation.

Furthermore, a party's predispute, post-contracting conduct can be powerful evidence of that party's intent at the time it entered into the agreement. (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753-754 ["'[t]he acts of the parties under the contract afford one of the most reliable means of arriving at their intention'"].) "For this reason, evidence of such conduct . . . is admissible to resolve ambiguities in the

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[3] Bob Yari, who owns or controls Persik and its related entities, testified that during the negotiations with Haggis he insisted on the "actually received" language because "I never wanted to be in a situation where I was paying out a share on something I didn't receive."

contract's language." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393.) Here Sills, Haggis's auditor, testified without contradiction that in the statements Persik issued before his audit Persik reported "100 percent of the revenue" from the film's distributors as gross receipts. It was only after Sills's audit reported that a number of accounting errors by Persik had reduced the participation payments owed to Haggis by more than $1 million that Persik adopted its new interpretations of the contract. As the trial court observed, "defendants, after using a different definition for months and years of accounting to plaintiffs, simply changed their definitions to increase their own profits."

Persik does not deny that its contract with Haggis is susceptible to the interpretation that we have given it, i.e. that Haggis's participation payments are based on all of the film's gross revenue not just the gross revenue remaining after deducting Apollo's share. Persik argues, however, that such an interpretation leads to an "'‘extraordinary, harsh, unjust, [and] inequitable'" result and therefore must be rejected. (Emphasis omitted.) (See *Richeson v. Helal* (2007) 158 Cal.App.4th 268, 277.) The result is unjust, Persik maintains, because under our interpretation of the contract Persik will lose $2.8 million dollars from financing the film.

Assuming for the sake of argument that such a loss would require a different result in this case, Persik fails to cite any evidence in the record to support its claim that it lost $2.8 million on the film so we are free to ignore it. (*Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551, 1560.)

II. PERSIK HAS NOT SHOWN THAT THE COURT ERRED BY CALCULATING THE CREATIVE CONTRIBUTORS' CONTINGENT COMPENSATION ON A CASH BASIS.

Persik argues that in calculating Haggis's damages the court erroneously failed to offset the third party participations due to all third party participants as required by section 13(a)(*i*) of the contract.

The record does not support that argument. In its Statement of Decision the court specifically found that the contracts between the plaintiffs and Persik "require the respective profit participants in the contract to bear the participations paid to the other profit participants, i.e., [Fraser's] participation would be reduced by the third party participations that had been previously paid to [Haggis]."

The variance in the amount of damages Persik contends are due Haggis (accepting for sake of argument the court's interpretation of the contract) and the amount of damages the court awarded stems from the court's decision that the offsets against participations described above should be calculated "on a 'cash' basis and not an accrual basis." (This reversed an earlier ruling by the court approving Persik's accrual accounting.) The court adopted the reasoning of Haggis's expert, Sills, and rejected that of Brown, Persik's chief financial officer. Sills explained that "the amounts of other participants' participations that the plaintiffs bear are a burden on the plaintiff's participation and a benefit to the defendants' revenue. Hence, unless and until defendants have paid the obligation, there is no basis for the participant to bear that burden." (Emphasis omitted.) Sills further explained that, "per industry standards, if defendants pay the participations, then in the next participation statement those amounts may be deducted; however, until they are paid there is no way to know if the obligation will ever be paid or if the obligation is just showing as due to further reduce the participation paid to plaintiffs." On appeal, Persik presents no argument to the contrary.

III. THE COURT CORRECTLY HELD THAT ALL PAYMENTS TO LIONS GATE AND DEJ WERE DISTRIBUTION FEES SUBJECT TO A CAP ON DEDUCTIONS FROM GROSS RECEIPTS.

The contract between Persik and Haggis allows Persik to deduct "distribution fees" from gross receipts in calculating Haggis's third party participations but at the third breakeven point this deduction is capped at 32.5 percent. Jon Gumpert, an expert witness for Haggis with decades of film industry experience, testified that distribution fees are capped "in order to protect [third party participants] so that the combined fees don't add up to so much that there is nothing left over for the participant." There is no cap on the amount of contingent compensation that can be deducted from gross receipts. (See discussion in Part II, *ante*.)

In auditing Persik's payments to Haggis, Sills found that Persik had exceeded the cap on distribution fees that it could deduct from gross receipts by over two million dollars. The court "accept[ed] Sills'[s] analysis as credible."

On appeal Persik claims the money it paid to Lions Gate and DEJ that the court found exceeded the cap on distribution fees was not really payment of distribution fees but was actually payment of "contingent compensation" not subject to the cap. (Emphasis omitted.) The trial court disagreed and we concur.

Gumpert testified that his review of the Lions Gate's contract with Persik showed that Lions Gate "did not purchase an equity interest in the picture. All it did was acquire a 25-year distribution license limited to North America." Therefore, he concluded, Persik's payments to Lions Gate "can only be a distribution fee because [Lions Gate] is not an owner. It made no investment in the film. It is simply a licensee." Gumpert reached a similar conclusion with regard to DEJ: money paid to DEJ in excess of the cap "should be disregarded for purposes of calculating [Haggis's] participation." The court found Gumpert's testimony "credible."

Persik does not challenge Gumpert's or Sills's testimony. Instead, it points to its contracts with Lions Gate and DEJ which it claims expressly distinguish between distribution fees and shares in the film's profits and provides that Persik shall make both types of payments to Lions Gate and DEJ. The contract at issue here, however, is the one between Persik and Haggis. As we pointed out above, Persik cannot alter what it promised to pay Haggis under their contract by entering into subsequent contracts with other parties. (See discussion at p. 9, *ante*.)

IV. PERSIK HAS NOT SHOWN THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING THAT THE FIVE DEFENDANTS ARE JOINTLY AND SEVERALLY LIABLE AS ALTER EGOS OF EACH OTHER.

The court found the six named defendants—Persik Productions, Inc. (subsequently renamed Bob Yari Productions, Inc.), Yari Film Group, Crash Productions, LLC, Bull's Eye Productions, LLC, Crash Distribution, LLC and Syndicate Films International, LLC[4]—jointly and severally liable to Haggis as "the alter egos of one another."

Alter ego liability is not limited to cases in which the court pierces the "corporate veil." It also applies when the defendants constitute a "single-enterprise." (*Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 512) Under the single enterprise theory alter ego liability attaches when "the court, for sufficient reason[s], has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it." (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249-1250.)

The same factors apply in determining single enterprise liability as in determining alter ego liability based on piercing the corporate veil. (*Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc.* (2013) 217 Cal.App.4th 1096, 1108.) Those factors include, but are not limited to, "'the commingling of funds and assets of the two entities, identical equitable ownership in the two entities, use of the same offices and employees, disregard of corporate formalities, identical directors and officers, and use of one as a mere shell or conduit for the affairs of the other.'" (*Id*. at pp. 1108-1109; citations omitted.)

Our job is to determine if substantial evidence supports the court's findings. Appellants' job is to show us that the evidence is not substantial. This they have failed to do.

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[4] Bob Yari was not a named defendant at the time of the original judgment. (See fn. 1, *ante*.)

The court found that all six defendants were the "puppets" of Bob Yari who owns Davand Holdings LLC which owns Persik which owned Crash Productions and Crash Distributions. At all times relevant to this case Yari had at least a 50 percent ownership interest in Bull's Eye Productions and either Yari or Davand owned Syndicate. The court made the following additional findings. None of the six defendants had a separate command or control structure. Revenue from the film deposited into Crash Distributions was transferred to Persik within days. Yari used Crash Distribution assets to settle a lawsuit by Apollo against Persik in connection with a different film. All six defendants operated out of the same business address, had no employees and their only officers were Yari and Brown. Yari charged personal expenses having nothing to do with the film through the defendants. Persik's general ledger showed a number of transactions involving Yari owned companies that had no connection to Crash but for accounting purposes were "related to 'Crash.'"

In arguing against the court's finding of single enterprise liability Persik cites evidence showing that defendants, while affiliated with each other, were formed at different times for different business purposes and had different owners and officers amongst them. (The court found that defendants had only two owners, Yari and Davand, and two officers, Yari and Brown.) There was also evidence that the defendants adhered to "corporate formalities" and at all times kept separate funds and bank accounts.

When determining whether substantial evidence supports the trial court's judgment, we do not consider whether there is evidence from which the court could have drawn a different conclusion but whether there is substantial evidence to support the conclusion that the court drew. (*Knapp v. AT&T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941.) Here, Persik has cited some evidence that tends to support the rejection of alter ego liability, but Persik has not argued against the sufficiency of the evidence (relied upon by plaintiffs and the trial court) that tends to support the trial court's imposition of alter ego liability. We therefore must reject Persik's argument.

V. THE COURT PROPERLY AWARDED PREJUDGMENT INTEREST.

The court awarded Haggis prejudgment interest under Civil Code section 3287, subdivision (a), which states in relevant part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled to also recover interest thereon from that day[.]" The parties agree that our review of that decision is de novo. (*KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 390-391.)

As a general rule, damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of Civil Code section 3287 "'where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage.'" (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958 (*Wisper Corp.*).) The award of prejudgment interest "is intended to make the plaintiff whole 'for the accrual of wealth which could have been produced during the period of loss.'" (*Ibid.*) In contrast, "where the amount of damages cannot be resolved except by verdict or judgment, prejudgment interest is not appropriate." (*Id.* at p. 960.) This exception to the general rule reflects the view that it is unfair to penalize a person for failing to pay a sum that is unascertainable prior to judgment. (Comment, Interest As Damages In California (1958) 5 UCLA L. Rev. 262, 263, fn. 6.) Thus, it is well-established that an award of prejudgment interest is not authorized where the amount of damage depends on a judicial determination based upon conflicting evidence. (*Wisper Corp., supra*, 49 Cal.App.4th at p. 960.) The test developed by case law is whether the defendant actually knew the amount owed the plaintiff or could have computed the amount from reasonably available information. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907.)

We see no reason why an exception to prejudgment interest should not also apply where, as here, the amount due under a contract depends on a judicial resolution of conflicting interpretations of the contract's provisions *provided that* the defendant's contractual interpretations were not frivolous or presented for the purpose of delaying payment due under the contract. (See *Hansen v. Covell* (1933) 218 Cal. 622, 630 ["[W]here delay in payment is due to vexatious conduct on the part of the defendant, 'it is only just that he should repair the damage that has followed from the breach of his obligation' although the balance due to the plaintiff is 'in a certain sense unliquidated'"].)

Here the issue of liability merges with the basis of computation of damages since the essence of the case is the proper computation of the profit participations due Haggis under the contract. If Persik and Haggis had a good faith dispute about how Haggis's payments should be calculated under the contract and their dispute could only be resolved by a judicial determination based on conflicting interpretations of the contract terms then it would be unfair to assess Persik with prejudgment interest just as it is unfair to assess prejudgment interest when the amount of damage depends on a judicial determination based upon conflicting evidence. (Cf. *Wisper Corp.*, *supra*, 49 Cal.App.4th at p. 960.)

In this case, however, the court found that Persik did not have a good faith dispute with Haggis over the calculation of Haggis's participations. On the contrary, the court described Persik's contractual interpretations as "bogus."

The court found that in the beginning Persik agreed with Haggis on the method for calculating Haggis's participations. It was only after Haggis's auditor found that Haggis had been underpaid by approximately $1 million that Persik "'discovered'" that a mistake had been made in prior statements as to the method of calculating third party participations and that Haggis had actually been overpaid, not underpaid. The court questioned "whether this was truly a mistake" given the initial intent of Persik as revealed by its actions "not by the words of counsel's arguments at trial." Moreover, the court observed, Persik's conduct, "especially in changing the definitions of 'gross receipts' and 'third party participations' after using different definitions for months and years of accounting to plaintiffs, was designed to increase defendants' profits and is considered 'creative accounting.'" This creative accounting "was not a 'mistake' by defendants," the court declared, "but rather an afterthought of how to increase revenue, and *an intentional scheme to withhold money owed to plaintiffs*. . . . [D]efendants' diversion of funds deprived [p]laintiffs of contractual benefits." (Italics added.) Finally, the court pointed out that the only witness to support Persik's interpretation of the contract was its owner Bob Yari "who provided no evidence as to the meaning of the term 'gross proceeds' . . . and who was not directly involved in negotiating agreements with either the plaintiffs or Apollo."[5] "Neil Sacker, the attorney who negotiated the agreements for defendants stated otherwise. . . . Jan Koberlin, the person who negotiated defendants['] arrangements with Apollo stated otherwise. Likewise, plaintiffs' experts, Steven Stills and Jon Gumpert, who were, in the court's view, experienced and credible, stated otherwise."

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

MILLER, J.*

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5 In support of Persik's interpretation of paragraph 13(b), Bob Yari, who owns or controls Persik and its related entities, testified that during the negotiations with Haggis he repeatedly rejected Haggis's attempt to broaden the revenue base for calculating its third party participation by counting gross receipts "at source"—meaning the money the film's distributors received from the exhibiters. Yari said that he rejected the "at source" language. The court found Yari's testimony lacked credibility and gave it "little, if any, weight."

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.